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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 ALLSTATE INSURANCE CO.,

10 Plaintiff,

11 v.

12 DAVID THOMSON, *et al.*,

13 Defendants.

Case No. C07-0739RSL

ORDER DENYING
SECOND MOTION FOR
SUMMARY JUDGMENT

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16 **I. INTRODUCTION**

17 This matter comes before the Court on an “amended” motion for summary
18 judgment (Dkt. #28) filed by plaintiff Allstate Insurance Company (“Allstate”). Allstate
19 seeks an order stating that it is not obligated to provide coverage for, or a defense to,
20 defendants David and Johna Thomson (the “Thomsons”) for the claims made against
21 them by defendant Jason Boerner (“Boerner”).¹ Allstate argues that Boerner alleges

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23 ¹ On September 4, 2007, the Court granted Allstate’s motion and entered a default
24 judgment against defendant Boerner, who has never appeared in this action. However, it
25 is unclear why Boerner, who is not a party to the insurance contract, was named as a
defendant.

26 ORDER REGARDING SECOND MOTION
FOR SUMMARY JUDGMENT - 1

actions that, even if true, are not covered by its policy with the Thomsons.

For the reasons set forth below, the Court denies plaintiff's motion.²

II. DISCUSSION

A. Background Facts.

On December 1, 2006, Boerner filed suit against the Thomsons in King County Superior Court for fraud and negligent misrepresentation. Declaration of Douglas Foley, (Dkt. #17) ("Foley Decl."), Ex. A (the complaint in the underlying lawsuit, hereinafter, the "Underlying Complaint"). Boerner alleged that the Thomsons concealed physical defects in the house that they sold to him. Other facts relevant to this motion are set forth in the Court's previous order denying Allstate's first motion for summary judgment, and with the exception of the relevant policy language, will not be repeated here.

The policy contains the following provision:

Coverage X
Family Liability Protection

Losses We Cover Under Coverage X
Subject to the terms, conditions and limitations of this policy, Allstate will pay damages which an injured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy.

Foley Decl., Ex. B at p. 36. The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in bodily injury or property damage." The term "property damage" is defined to mean "physical injury to or destruction of tangible property, including loss of its use resulting from such physical injury or destruction." Id. at p. 12.

² Because the Court finds that this matter can be decided on the parties' memoranda, declarations, and exhibits, Allstate's request for oral argument is denied.

1 The policy excludes the following:

2 Losses We Do Not Cover Under Coverage X:

- 3 1. We do not cover any bodily injury or property damage intended by, or
4 which may reasonably be expected to result from the intentional or criminal
5 acts or omissions of, any insured person. This exclusion applies even if:
6 a) such bodily injury or property damage is of a different kind or degree
7 than intended or reasonably expected; or
8 b) such bodily injury or property damage is sustained by a different person
9 than intended or reasonably expected.
- 10 2. We do not cover bodily injury to an insured person or property damage to
11 property owned by an insured person whenever any benefit of this coverage
12 would accrue directly or indirectly to an insured person.

13 * * * *

- 14 14. We do not cover property damage to property rented to, occupied or used
15 by, or in the care of an insured person.

- 16 15. We do not cover any liability an insured person assumes arising out of any
17 contract or agreement.

18 Foley Decl., Ex. B at pp. 36-38.

19 On January 10, 2008, the Court denied Allstate's motion for summary judgment.
20 Shortly thereafter, Allstate filed a motion for reconsideration. The Court denied the
21 motion, and noted that Allstate asserted two arguments not advanced in its motion for
22 summary judgment: (1) it relied on Allstate v. Bowen, 121 Wn. App. 879 (2004) and
23 argued that negligent misrepresentation in a real property transaction does not cause
24 property damage; and (2) it argued that the fortuity doctrine precludes coverage. The
25 Court explained that Allstate could file another motion for summary judgment "that
26 advances its new arguments." (Dkt. #27). Allstate subsequently filed an "amended"
motion for summary judgment in which it raises all of its previously asserted, and

1 rejected, arguments for summary judgment in addition to the two new arguments.³ The
 2 Court's ruling on the previously raised arguments is the law of the case and will not be
 3 revisited. In this order, the Court will consider only Allstate's two new arguments.

4 **B. Summary Judgment Standard.**

5 On a motion for summary judgment, the Court must "view the evidence in the light
 6 most favorable to the nonmoving party and determine whether there are any genuine
 7 issues of material fact." Holley v. Crank, 386 F.3d 1248, 1255 (9th Cir. 2004). All
 8 reasonable inferences supported by the evidence are to be drawn in favor of the
 9 nonmoving party. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir.
 10 2002). "[I]f a rational trier of fact might resolve the issues in favor of the nonmoving
 11 party, summary judgment must be denied." T.W. Elec. Serv., Inc. v. Pacific Elec.
 12 Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987).

13 **C. Analysis.**

14 The parties agree and the Court finds that Washington law applies.

15 In Washington, insurance policies are construed as contracts. An insurance policy
 16 is construed as a whole, with the policy being given a fair, reasonable, and
 17 sensible construction as would be given to the contract by the average person
 18 purchasing insurance. If the language is clear and unambiguous, the court must
 19 enforce it as written and may not modify it or create ambiguity where none exists.
 20 If the clause is ambiguous, however, extrinsic evidence of intent of the parties may
 21 be relied upon to resolve the ambiguity. Any ambiguities remaining after
 examining applicable extrinsic evidence are resolved against the drafter-insurer
 and in favor of the insured. A clause is ambiguous when, on its face, it is fairly
 susceptible to two different interpretations, both of which are reasonable.

22 ³ The previously raised, and rejected, arguments include: (1) the exclusions apply
 23 for property "owned" by an insured or property "occupied by" or "in the care of" an
 24 insured person; (2) Allstate is not required to provide coverage for "property damage to
 25 property rented to, occupied or used by, or in the care of, an insured person;" and (3)
 Allstate is not required to provide coverage for "bodily injury, personal injury or property
 damage arising from any contract or agreement."

1 Panorama Vill. Condo. v. Allstate Ins. Co., 144 Wn.2d 130, 137 (2001) (quoting
2 Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665-66 (2000))
3 (internal quotations omitted). The Thomsons concede that Allstate did not have a duty to
4 defend or indemnify them for the fraud claim. The Court therefore considers whether
5 Allstate has a duty to defend and/or indemnify for the remaining claims based on
6 negligence.

7 The duty to defend is broader than the duty to indemnify. See, e.g., Truck Ins.
8 Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 760 (2002). The duty to defend
9 “arises when a complaint against the insured, construed liberally, alleges facts which
10 could, if proven, impose liability upon the insured within the policy’s coverage.” Id.
11 (internal citation and quotation omitted). The insurer is relieved of the duty to defend
12 only if the claim alleged is clearly not covered by the policy. Kirk v. Mt. Airy Ins. Co.,
13 134 Wn.2d 558, 561 (1998) (internal citation omitted).

14 The facts and the policy language in this case are very similar to those in Allstate
15 v. Bowen, 121 Wn. App. 879, 900 (2004), in which the underlying complaint alleged that
16 the insureds “‘intentionally or negligently, or innocently failed to disclose accurate and
17 truthful information on the Form 17’ and that as a result [the buyers] suffered ‘damages
18 to their property and other financial damages.’” In that case, the court held that there was
19 a duty to defend because the complaint alleged an occurrence, the failure to disclose, and
20 property damage caused by the failure to disclose. Id. at 901 (“This is essentially a
21 misrepresentation claim”). Similarly, in this case, the underlying complaint alleges
22 property damage,⁴ intentional or negligent failure to disclosure, and resulting damages.

24 ⁴ The property damage alleged in this case includes “major cracks in the
25 foundation” and buckling and cracking of the kitchen floor caused by water intrusion.

1 As in *Bowen*, those allegations triggered the duty to defend. Once the duty to defend has
2 been triggered, the duty is relieved “only if the claim is clearly covered by an applicable
3 exclusionary clause within the policy.” American Best Food, Inc. v. London, Ltd., 138
4 Wn. App. 674, 683 (2007) (internal citations omitted). Allstate argues that unlike in
5 *Bowen*, the policy in this case contains exclusions for “owned property” and “property
6 occupied by an insured or in the care of an insured.” Allstate argues that the Thomsons
7 owned the property when the damage occurred. The Court, however, previously ruled
8 that those exclusions do not relieve Allstate of the duty to defend. Exclusions are
9 construed against the insurer. See, e.g., West Am. Ins. Co. v. State Farm Mut. Auto Ins.
10 Co., 4 Wn. App. 221 (1971). In addition, the Thomsons do not own or occupy the
11 property *now*, nor did they when Boerner filed the underlying action.

12 Allstate also contends that it has no duty to defend because the economic loss
13 claimed is not fortuitous.⁵ Allstate contends that an insurer cannot be required to provide
14 coverage for a loss that the insured knew or should have known about when it purchased
15 the insurance. Allstate’s Motion at p. 11 (citing Aluminum Co. v. Aetna, 140 Wn.2d 517
16 (2000)). However, in this case, the underlying complaint does not allege, nor is there any
17 evidence in the record to show, that the Thomsons knew about the damage when they
18 purchased the policy.

19 In addition, Allstate notes that the policy provides third party, not first party
20 coverage. It contends that if the Thomsons had asked Allstate to pay for the repairs

21 _____
22 Underlying Complaint at ¶¶ 3, 5.

23 ⁵ Allstate also argues that it is not required to provide coverage for claims arising
24 out of its insured’s intentional acts. However, although the Underlying Complaint alleges
25 some intentional acts, including fraud, it also alleges negligent misrepresentation, which
does not require intent.

1 before the sale, Allstate would have had no obligation to do so because of the owned
2 property exclusion. However, Allstate's argument ignores the fact that a *third party* is
3 claiming to have been injured. Accordingly, the Court finds that Allstate has a duty to
4 defend the Thomsons.

5 Allstate also contends that it has no duty to indemnify. However, the Court finds
6 that argument is premature. Unlike in *Bowen*, the underlying litigation is continuing. In
7 addition, plaintiff in the underlying litigation is in the process of amending his complaint,
8 which could alter the nature of his claim and Allstate's duty. In addition, discovery is on-
9 going. For these reasons, the Court denies the motion as premature.

10 III. CONCLUSION

11 For all of the foregoing reasons, the Court DENIES plaintiff's motion for summary
12 judgment (Dkt. #28).

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14 DATED this 10th day of March, 2008.

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17 Robert S. Lasnik
18 United States District Judge
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